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## The Promise of Tribe's City: Self-Government, the Constitution, and a New Urban Age

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# THE PROMISE OF TRIBE'S CITY: SELF-GOVERNMENT, THE CONSTITUTION, AND A NEW URBAN AGE

David J. Barron\*

## I. INTRODUCTION

Once dying cities are now competing to be engines of global finance. Formerly desolate downtowns are now booming with luxury condo developments and high-end eateries. And many central cities that lost population each decade after World War II have grown steadily since 1990. As these comeback cities attract more businesses and people, they become more capable of planning for their futures. No longer trapped in a downward spiral, they can now assume a lead role in shaping the kinds of communities they wish to be. In many cases, they have responded by adopting novel regulations—living wage ordinances, unprecedented linkage measures targeting big box retailers, cutting-edge civil rights laws, and new environmental regulations—and by seeking greater fiscal and regulatory authority from their state legislatures. In so doing, they have frequently confronted the objection that they are either exceeding their existing legal powers or inappropriately seeking new ones. How should they respond?

To address this question, I focus on the work of the nation's foremost scholar of American constitutional law, Laurence Tribe. This approach may seem like a curious one. Professor Tribe's field is constitutional law, not local government law, and cities have never been his central object of concern. Nor is constitutional law thought to have much to say about city power. The standard view is that, for constitutional purposes, cities are like any other state administrative agency. And so it might be thought that state, rather than federal, law matters most when thinking about city power. What, then, can be learned about city power, or its relationship to law, by focusing on Professor Tribe's work?

Quite a lot, as it turns out. In the course of his distinguished career as a Supreme Court advocate, Professor Tribe has represented a city on three occasions.<sup>1</sup> In each case, he provided more than a technical legal defense of local action. He set forth an

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\* Professor of Law, Harvard Law School. I wish to thank Myra Barron, Gerald Frug, Juliette Kayyem, Frank Michelman, Richard Schragger, and, of course, Larry Tribe—not only for his views on this paper but for all that he has done to make it possible. I also want to thank Michael Bern, Jonathan Hofer, and Mina Makarios for outstanding research assistance.

1. *Fisher v. City of Berkeley (Fisher II)*, 475 U.S. 260 (1985); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *City of Boston v. Anderson (City of Boston II)*, 439 U.S. 951 (1978).

important approach to understanding the relationship between law and city power. To be sure, Tribe litigated these three cases in the 1980s, but the view of city power that he espoused then is, if anything, even more relevant now. At the time these cases arose, many assumed that suburbanization and de-industrialization were the real constraints on city power. The realities of private business investment decisions, and cities' desperate need to expand their tax bases, were thought to make creative urban action practically impossible. Cities might argue for new legal powers, but, it was thought, their practical need to cater to the private market would lead them to avoid using them. In other words, many argued that the real limits on urban power were economic rather than legal.<sup>2</sup>

In the current economic environment, however, successful cities enjoy much greater effective power, and thus legal limits are now often the critical barriers to their capacity to implement their own visions of the future. I therefore use Tribe's advocacy in these cases to shed light on the novel assertions of city power that current urban conditions make possible. In doing so, I argue that Tribe's contribution in these cases transcends the context of federal constitutional litigation. By forcefully defending cities' status as independent, democratic polities that are capable of addressing, as no other institutions can, some of society's most pressing problems, Tribe articulates an important constitutional vision in which urban centers are central to securing the kind of self-government that, at bottom, our founding charter is intended to promote.

## II. CITIES, THE CONSTITUTION, AND SELF-GOVERNMENT

As the leading treatise on the jurisprudence of our founding document, Professor Tribe's justly celebrated work, *American Constitutional Law*, offers a good place to get a sense of his view of cities' legal status and of contemporary constitutional law's conception of it. On first glance, the treatise seems to adopt a very limited view of city power. Under the entry for "cities" in the index, for example, one finds only: "see political subdivisions."<sup>3</sup> In this way, the treatise seems to conceive of cities as the Supreme Court treated them in the famous case of *Hunter v. Pittsburgh*.<sup>4</sup> There, in sweeping language, the Court explained that municipalities have no federal constitutional rights against their states, nor has any one the right to compel the empowerment of cities, because cities are merely "creatures" of states.<sup>5</sup>

Nor do cities fare much better when one turns to the treatise's text. The first passage to discuss cities considers whether a municipality, when it goes bankrupt, can receive direct financial aid from the federal government. The question concerns whether the Spending Clause's "general welfare" requirement precludes such targeted financial assistance because it would fail to serve a truly public purpose. In the end, the text concludes there is no constitutional barrier; it concludes that the substantial extra-local consequences associated with a single city's bankruptcy provide a constitutionally

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2. See e.g. Paul E. Peterson, *City Limits* 4 (U. Chicago Press 1980); see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 113–14 (1990).

3. Laurence H. Tribe, *American Constitutional Law* 1757 (2d ed., Foundation Press 1988).

4. 207 U.S. 161 (1907).

5. *Id.* at 178–79.

sufficient predicate for federal intervention.<sup>6</sup> Thus, the treatise's first discussion of cities focuses on the federal government's constitutional power to bail them out rather than on their own constitutional authority to help themselves.

Other portions of the treatise describe the constitutional status of cities in more affirming terms,<sup>7</sup> but there is nothing unusual about the depiction contained in the passages discussed above. Constitutional law, and constitutional theory, has long treated cities as if they were either invisible or problematic.<sup>8</sup> Still, one might think that Professor Tribe would be particularly uncomfortable with this conventional approach. He has long argued that the Constitution is, at root, intended to protect and promote the practice of self-government.<sup>9</sup> To that end, he has argued that traditional modes of constitutional analysis have given far too little attention to the structural dimensions of individual choice making.<sup>10</sup> But if that is so, why should the Constitution take such a limited view of the legal status of *cities*? Surely they are critical institutions through which individuals attempt to govern themselves. Can cities fully contribute to the practice of self-government if constitutional law casts such a jaundiced eye upon them? And conversely, can the Constitution really promote self-government if it does not make room for cities to decide things for themselves?

### III. SELF-GOVERNMENT AND THE DEMOCRATIC CITY OF THE FUTURE

In a famous speech, the democratic theorist Robert Dahl offered what we might think of as one way of answering these questions—and one that, as we shall see, Professor Tribe himself may be understood to have embraced in advocating on behalf of city power before the Supreme Court of the United States. Speaking to the American Political Science Association in 1967, Dahl asked whether there was any institution “powerful enough, autonomous enough, and small enough to permit, and, in the right circumstances to encourage, a body of citizens to participate actively and rationally in shaping and forming vital aspects of their lives in common?”<sup>11</sup> He thought the question urgent given the severe social crises confronting the nation and the growing sense that the democratic system was failing to provide people with a means of addressing them. In casting about for candidates, Dahl rejected both the small town, deeming it ill-suited to this “industrial and post-industrial epoch,”<sup>12</sup> and the workplace, concluding it

6. Tribe, *supra* n. 3, at 322–23 n. 11.

7. See e.g. *id.* at 21 (noting Tribe's approval of the holding in *Natl. League of Cities v. Usery*, 426 U.S. 833 (1976)); see also Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Services*, 90 Harv. L. Rev. 1065, 1102 (1977) (endorsing the holding in *National League of Cities*, 426 U.S. 833).

8. See David J. Barron, *Why (and When) Cities Have a Stake in Constitutional Enforcement*, 115 Yale L.J. 2218, 2232 (2006).

9. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1898 (2003).

10. See e.g. Laurence H. Tribe, *Contrasting Constitutional Visions: Of Real and Unreal Differences*, 22 Har. Civ. Rights-Civ. Libs. L. Rev. 95, 103 (1987); see also Tribe, *supra* n. 7, at 1065; Laurence H. Tribe, *Structural Due Process*, 10 Har. Civ. Rights-Civ. Libs. L. Rev. 269, 269 (1975).

11. Robert A. Dahl, *The City in the Future of Democracy*, 61 Am. Political Sci. Rev. 953, 960 (1967).

12. *Id.* at 961.

encompassed too narrow a slice of human experience.<sup>13</sup> He ultimately selected “the democratic city of the future,”<sup>14</sup> which he contended was the critical institution for facilitating the practice of self-government that had become practically impossible.

In arguing that the democratic city of the future would be small enough to permit meaningful participation yet large enough to address problems that were not just trivial, Dahl appears to have had in mind a distinctly urban community—one with a range of persons from a variety of backgrounds, that was, if not diverse racially and ethnically, at least diverse socio-economically.<sup>15</sup> Dahl also seems to have had in mind a community with a relatively high density of settlement and a rich mix of land uses.<sup>16</sup> There did not need to be an endless supply of skyscrapers in the “democratic city of the future,” but it could not be a place where the “yards are wide, [and the] people few.”<sup>17</sup> Just as the stereotypical bedroom suburb could not qualify, neither could the megalopolis. The democratic city of the future, Dahl argued, should have a population of no more than 200,000, as a bigger one might preclude the kind of participation American society lacked.<sup>18</sup> Still, this exact size constraint may not have been strictly necessary to his argument.<sup>19</sup>

As to the function itself, Dahl argued that the democratic city of the future would permit citizens to address critical problems in concrete and relatively manageable contexts. In this way, it would help combat people’s instinct to retreat into their private lives or to leave policymaking to a disconnected professional class that operated at a higher and more remote scale. As Dahl argued, the democratic city also could play a vital role in enabling people collectively to

deal with such crucial problems as the education of our children, our housing, the way we travel to and from our place of work, preventive health measures, crime, public order, the cycle of poverty, racial justice, and equality—not to mention all those subtle and little understood elements that contribute so heavily to the satisfaction of our desires for friendship, neighborhood, community, and beauty.<sup>20</sup>

Dahl was careful to emphasize that the nation had not yet created the democratic city of the future. The nation’s actual cities, Dahl argued, are not merely “non-cities, they are anti-cities—mean, ugly, gross, banal, inconvenient, formless, hazardous, incoherent, unfit for human living deserts from which a family flees to the greener

13. *See id.* at 960–61.

14. *See id.* at 964.

15. *Id.* at 964.

16. Dahl, *supra* n. 11, at 965.

17. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

18. Dahl, *supra* n. 11, at 969.

19. Some recent research seems to confirm Dahl’s notions. A place of the size he favored, with the other features he had in mind, turns out to be a highly engaged and participatory one—more so even than smaller but more homogeneous suburbs. *See* Eric Oliver, *Democracy in the Suburbs* 33–37 (Princeton U. Press 2001). To call New York City a local government may make “nonsense of the term,” *see* Dahl, *supra* n. 11, at 968, but Dahl himself indicates that it may be possible to transform even the megalopolis into something like a democratic city. *Id.* That seems all the more possible because of new technological means of communication. And, of course, as the nation’s population grows, the only governmental alternatives to the city—the state and national governments—themselves have to answer to what are ever larger constituencies.

20. Dahl, *supra* n. 11, at 965.

hinterlands as soon as job and income permit.”<sup>21</sup> As a political scientist, Dahl predictably did not attribute this failure to the law of city power, but he recognized that the democratic city of the future would need sufficient “powers and resources.”<sup>22</sup> Yet it is the law of city power that determines the extent of a city’s fiscal authority, how it may spend the resources it has available to it, and how it may regulate private actors in light of those resources. For the democratic city to thrive, therefore, the law of city power must support it.

#### IV. THE UNCERTAIN LEGAL STATUS OF CITIES

And so we return to a consideration of the work of Professor Tribe. As an advocate before the nation’s high Court in the 1980s, Tribe three times represented cities that roughly fit the specifications of Dahl’s ideal site for self-government—the city of Boston twice<sup>23</sup> and the City of Berkeley, California once.<sup>24</sup> Boston was home to just over a half million people when he represented it in the 1980s,<sup>25</sup> and Berkeley had only slightly more than 100,000 at that time.<sup>26</sup> Neither city, in other words, was so large or so small as to have nothing to do with Dahl’s argument. Moreover, Boston and Berkeley were each in the midst of dealing with the very problems Dahl said cities could and should help the nation address: economic shocks, housing crises, and the integration of diverse residents into a functioning community. Each was also asserting independent authority over those very issues. For that reason, each confronted potential legal limitations on their ability to do so. How, then, did Tribe go about arguing for these cities’ power?

The question is worth pursuing because, at various times, courts have seized upon radically different legal conceptions of what a city is. Because the city has been a legal enigma, lawyers representing it cannot restrict their field of vision to the technical doctrines and specific regulatory provisions that bear directly on a discrete dispute over city power. They also must attend to the deeper conceptual choices that such disputes inevitably pose. While courts sometimes conceive of cities as if they are no different from any other level of government, that is not always the case. Sometimes they question whether it is right to think of cities as governments at all. And even when they conclude cities *are* governments, they are often uncertain whether to classify them as political subdivisions of their states or as independent democratic polities in their own right. A lawyer for the city, then, confronts some basic questions about what a city is.

The possibility that cities are not really governments at all is largely an artifact of cities’ unique legal history. Early American law did not distinguish between cities and private business corporations. Both were thought to be corporate rather than

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21. *Id.* at 964.

22. *Id.* at 965.

23. *White*, 460 U.S. 204; *City of Boston II*, 439 U.S. 951.

24. *Fisher II*, 475 U.S. 260.

25. U.S. Bureau of the Census, *Population of the 100 Largest Urban Places: 1980*, <http://www.census.gov/population/documentation/twps0027/tab21.txt> (accessed Mar. 3, 2008).

26. The Assn. of Bay Area Govts., *Berkeley City Historic Population*, <http://www.abag.ca.gov/abag/overview/datacenter/popdemo/berkeley.html> (accessed Mar. 3, 2008).

governmental bodies. The fact that cities are still called municipal corporations—and that the city’s lawyer is often called the corporation counsel—reflects this historical legacy.<sup>27</sup> But the notion also stems from a persistent ambivalence about decentralization. There are a very large number of municipalities, more than 19,000 local general purpose governments altogether.<sup>28</sup> The impulse to describe cities as more corporate than governmental reflects a concern that governmental power should not be permitted to be exercised in the non-uniform manner that their numerosity suggests is likely. The more cities are thought to lack the legitimacy of true governments, like states or nations, the more their powers may be confined without seeming to undermine commitments to democracy.

Against this background, a city lawyer has good reason to be wary of conceptualizing the city as a corporate rather than a governmental body. Courts that view cities as corporate bodies often conclude that their assertions of public authority are fundamentally inconsistent with their basic nature. Dillon’s Rule, which requires courts to construe state legislative delegations of authority to cities strictly, rests on this privatized understanding of city power. It reflects the idea that the city should not be permitted, as other levels of government may, to regulate the private market vigorously.<sup>29</sup> Under Dillon’s Rule, the city may only do things on its own that are inextricably connected to the city’s “business”—paving the streets, clearing the snow, picking up the garbage, and meeting expenses. To exercise a more general police power, a city must have been given specific and express authority by state statute.<sup>30</sup>

In a similar vein, the Supreme Court has long held that, because cities are more private than public, they do not deserve the presumptive immunity from suit that states, as true sovereigns, enjoy. As a result, they do not benefit from the Eleventh Amendment immunity that protects state treasuries.<sup>31</sup> Nor do they enjoy the exemption their states enjoy from the nation’s most important federal civil rights act, 42 U.S.C. section 1983. Indeed, cities can be sued for damages under section 1983 even though the statutory text identifies “persons” as proper defendants—a clear indication of the judicial willingness to treat cities as more private or corporate than public or governmental.<sup>32</sup>

There are, however, some advantages to depicting the city in corporate, rather than governmental, terms. If cities are really private, then courts may conclude that their actions pose less of a threat than those of the government itself. There is a reason that Robert Nozick did not perceive any conceptual tension between a vigorous defense of local autonomy and a strong defense of individual autonomy.<sup>33</sup> The local community,

27. Black’s Law Dictionary 235 (Bryan A. Garner ed., 7th ed., West 1999) (“City” is defined as “[a] municipal corporation.”).

28. See Demographia, *USA: Number of General Purpose Governments in Metropolitan Areas over 500,000*, <http://www.demographia.com/db-metgovts2002.htm> (accessed Mar. 3, 2008).

29. See generally David J. Barron et al., *Dispelling the Myth of Home Rule: Local Power in Greater Boston* (Rappaport Inst. Greater Bos. 2004) [hereinafter Barron, *Dispelling*]; David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 496 (1998) [hereinafter Barron, *Promise*].

30. See Gerald E. Frug et al., *Local Government Law* 138 (4th ed., West 2006).

31. *Lincoln Co. v. Lunning*, 133 U.S. 529, 530 (2004).

32. See e.g. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 701 (1978).

33. See Robert Nozick, *Anarchy, State and Utopia*, in Gerald E. Frug et al., *Local Government Law* 96–101 (4th ed., West 2006).

like any private club, may be understood to be establishing rules that members voluntarily accept rather than imposing laws against a minority's will. This same logic may underlie the Supreme Court's ruling in exclusionary zoning cases, like *Village of Belle Terre v. Boraas*, in which the associational character of municipal government is highlighted in the course of upholding land use restrictions designed to establish the special character of the community.<sup>34</sup> In fact, Tribe explores this very possibility in his treatise's discussion of *Belle Terre*.<sup>35</sup>

To be sure, this privatized, consensualist depiction of local power may be more useful to a small homogenous suburb than to a large, diverse central city.<sup>36</sup> But urban places may also gain from a privatized conception of the city's legal status. If cities are fundamentally like other corporations, then they might benefit from federal statutes that protect the latter (not to mention the constitutional provisions that also help them). In his dissent in *Nixon v. Missouri Municipal League*, for example, Justice Stevens concludes that a federal statute preempted state laws barring cities from entering the telecommunications services market. He reasoned that cities, no less than private corporations, were covered by the federal statute's protection of "any entity" that wished to enter that market.<sup>37</sup> By contrast, Justice Souter's opinion for the Court holds that cities were not covered. He reasoned that cities were merely subdivisions of their state governments, and thus that the federal statute cannot reasonably be construed to preempt a state government from limiting them.<sup>38</sup> Were a federal statute so construed, the state would implausibly be barred from limiting itself.

Even when a lawyer decides to argue that a city is a governmental rather than corporate body, another fundamental conceptual choice must be made. The lawyer must decide whether to present the city as a sovereign in its own right or as a mere political subdivision of its state. As with the public/private distinction, this choice, too, is complex. If cities are political subdivisions, then it would seem to follow that they may assert the rights of their states. So, for example, in *Printz v. United States*, the Supreme Court rejected Justice Stevens's suggestion that cities could not invoke a constitutional rule against federal commandeering because they were not sovereigns in their own right.<sup>39</sup> The Court responded that, although the Tenth Amendment protects *state* sovereignty, cities, as political subdivisions, enjoy the same constitutional protection from federal power as their creators.<sup>40</sup>

In other contexts, by contrast, the lawyer might conclude that it would be a mistake to portray a city as a mere agent of its state. Cases that deny cities standing to sue their states, for example, usually do so because they conclude that a state should not be permitted to sue itself.<sup>41</sup> Similarly, some Equal Protection cases insulate cities from

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34. 416 U.S. at 9.

35. Tribe, *supra* n. 3, at 1402–04.

36. See Briffault, *supra* n. 2, at 114.

37. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 143–44 (2004) (Stevens, J., dissenting).

38. See *id.* at 135.

39. Compare 521 U.S. 898, 931 n. 16 (1997) with *id.* at 955 n. 16 (Stevens, Souter, Ginsberg & Breyer, JJ., dissenting).

40. *Id.* at 931 n. 15.

41. See Barron, *supra* n. 8, at 2233.



liability because, as separate governmental communities, they are not responsible for the wrongs committed by their states.<sup>42</sup> Other Equal Protection cases even appear to permit cities to disregard state laws that preclude them from taking actions that would address local discrimination precisely because they are thought to be distinct democratic communities.<sup>43</sup>

All of this might suggest that the savvy city advocate should pick and choose from the available legal conceptions in order to ensure a favorable ruling. If casting the city as private would ensure victory, then private it is. If portraying the city as a political subdivision is the better move, then the lawyer should contend the city lacks juridical independence. Alternatively, if the city would most likely win if viewed as independent, then the advocate should argue for that conception of the city's legal status. In fact, however, the conceptual dilemma cannot be so easily avoided. The way courts conceive of cities—whether public or private, sovereign or subordinate—affects more than the outcome of a single case. The law of city power also shapes how city officials perceive the horizons of their own authority. Effective advocacy on behalf of city power, therefore, must take account not only of a particular case's outcome but also of systemic consequences. Or, at least, effective advocacy must do so if a lawyer is representing a city that is interested not simply in winning a particular case but in shifting the legal landscape in ways that will help to support assertions of city power over time and across a broad range of contexts.

Consider a legal structure that rests on the state creature premise. Many city actions may survive legal challenge, but the structure may lead city officials to believe they cannot act unless the state has clearly authorized them to do so. At the margins, then, the judicial affirmation of the state creature metaphor may make city officials uneasy about relying on broad constructions of state grants of authority or narrow constructions of potential state statutory restrictions. Similarly, a legal framework that seizes upon the private corporate analogy might also protect many city actions from legal challenge, even as it exerts a constraining influence. It may create a sense that the city must mimic the forms of power that are commonly used by other market participants in order to survive court review. As a result, over time, city officials may become more comfortable with relying on their contracting or proprietary powers than on their regulatory ones.<sup>44</sup>

Thus, lawyers for cities inevitably confront a challenging strategic choice. Since the city's legal status is always, in an important sense, "up for grabs," each conflict over city power presents an occasion to (re)decide its legal status. The lawyer's choice in characterizing the city's legal status, therefore, may influence not only the outcome of the particular dispute, but also the way city officials will understand their power more generally. And so the key questions: Should the city lawyer take advantage of an existing conceptualization of the city's legal status that, although systemically disempowering, is helpful in the case at hand? Or should the city lawyer push for an

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42. See *e.g.* *Milliken v. Bradley*, 433 U.S. 267, 289–90 (1977).

43. See *Romer v. Evans*, 517 U.S. 620, 633 (1996); *Wash. v. Seattle Sch. Dist.*, 458 U.S. 457 (1982); see generally Barron, *Promise*, *supra* n. 29, at 570–71, 586–95 (discussing these cases from a localist perspective).

44. See Barron, *Dispelling*, *supra* n. 29.

approach that would give cities greater confidence to act as independent democratic polities in their own right?<sup>45</sup> So long as a lawyer is representing a city that understands these broader stakes of any given legal dispute, then the challenge of defending city power is unusually complicated and important.

## V. TRIBE GOES TO COURT: THREE CITY POWER CASES

In each of the three cases that Professor Tribe argued on behalf of cities, he pushed the Court away from an embrace of either the state creature metaphor or the private corporate analogy. He urged the Court to conceive of the city in terms similar to those Dahl used in describing the democratic city of the future. In each case, Tribe portrayed the city as an independent democratic polity, uniquely positioned to facilitate the practice of self-government and the collective resolution of pressing societal problems through the exercise of public regulatory authority. Tribe pressed this conception, moreover, even when the relevant legal materials indicated the benefits of depicting the city as a quasi-private entity or a mere political subdivision of the state. Thus, Tribe was calling on the Court to change, rather than merely apply, the prevailing legal framework of city power.

Tribe may have had narrow, outcome-based reasons for doing so. Perhaps by forcefully contending that the city should win even if it were conceived of as an independent democratic polity, Tribe was suggesting that the city would clearly win on the alternative grounds that existing precedent arguably supported more clearly. But perhaps, in foregrounding a more controversial image of urban power—one based on a city's self-governing, democratic, and governmental pedigree—Tribe was making a point about how law *should* conceive of cities. Perhaps, in other words, Tribe was arguing, as Dahl had earlier suggested, that the practice of self-government was possible only in a world that promoted, rather than undermined, fully empowered democratic cities. Perhaps, in other words, he was promoting a broader idea of urban possibility, no doubt because he was representing cities that themselves wished for American law to embrace that very idea in order to alter the legal landscape in which they, and other cities, would operate as a more general matter. In this respect, Tribe seems to have been blessed with clients that well understood the broader stakes for city power of legal disputes over discrete exercises of urban authority.

### A. *Anderson v. City of Boston*

The first of the three cases concerned a dispute over a proposed referendum to amend the Massachusetts Constitution. At the time, and as is still the case, state law barred Boston from taxing either sales or income. This limitation made Boston unusually dependent on the property tax. The state's constitution further required Boston, like other cities, to apply the same tax rate to all types of property. The city responded by consistently assessing commercial property at a higher fraction of full market value than residential property, thereby shifting a large portion of the

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45. Cf. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. Leg. Educ. 518, 518 (1986) (theorizing this type of strategic dilemma for progressive judging).

considerable local property tax burden from homeowners to businesses. That longstanding practice had been foreclosed a few years earlier, however, by a ruling of the Massachusetts Supreme Judicial Court that required local governments to assess all taxable property at 100 percent of value. And so it seemed that a crisis for residential homeowners in Boston was about to hit, as their city property tax bills would skyrocket in response to new assessments.<sup>46</sup>

Boston officials looked upon the pending referendum as a potential solution, as it would authorize the city to place different types of property into distinct classes, subject them to differential tax rates, and thus once again make commercial property bear a larger share of the local tax burden. Accordingly, Boston Mayor Kevin White allocated substantial city funds to a voter education project aimed at promoting passage of the classification referendum. A group of local taxpayers sued, arguing that Boston lacked the affirmative authority to support one side of a contested election and that, in any event, the recently enacted comprehensive state campaign finance law preempted it from doing so. The city responded that Boston could fund the advocacy campaign pursuant to both a broad state statutory delegation of authority to spend money for local purposes and the state constitutional grant of home rule power. It further argued that the state's campaign finance statute did not apply to cities at all, and that, if applicable, the state-imposed restriction on municipal advocacy would violate the First Amendment.<sup>47</sup>

The Supreme Judicial Court of Massachusetts ruled against the city, holding that the state's campaign finance statute impliedly preempted the city's spending and that the city enjoyed no First Amendment right to disregard that prohibition.<sup>48</sup> Tribe then sought a stay from the United States Supreme Court, which he secured, thereby permitting the city to continue funding the advocacy campaign until after the election ended.<sup>49</sup> To be sure, the Supreme Court ultimately dismissed the case for want of a substantial federal question, but, by that time, the referendum had passed.<sup>50</sup>

Only a year before, in *First National Bank of Boston v. Bellotti*, the Supreme Court had struck down on First Amendment grounds a provision of the Massachusetts campaign finance law that barred *private* corporations from spending their own funds in support of a statewide referendum.<sup>51</sup> Combined with the Supreme Judicial Court's decision in *Anderson*, the ruling in *Bellotti* starkly raised the following question: Should a municipal corporation be entitled to the same First Amendment protection as a private one? Justice Brennan seemed to think so, as he explained in a brief chambers opinion that granted Tribe's request for a stay. Brennan explained that the Court's decision in *Bellotti* established that

corporate industrial and commercial opponents of the referendum are free to finance their opposition. On the other hand, unless the stay is granted, the city is forever denied any

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46. *Anderson v. City of Boston*, 380 N.E.2d 628, 630–31 (Mass. 1978); Jurisdictional State. at 6, *City of Boston v. Anderson (City of Boston III)*, 439 U.S. 1060 (1979).

47. *See Anderson*, 380 N.E.2d at 632–33, 635 n. 11.

48. *Id.* at 635, 637.

49. *City of Boston v. Anderson (City of Boston I)*, 439 U.S. 1389, 1391 (1978).

50. *City of Boston II*, 439 U.S. at 951.

51. 435 U.S. 765, 784 (1978).

opportunity to finance communication to the statewide electorate of its views in support of the referendum as required in the interests of all taxpayers, including residential property owners.<sup>52</sup>

In light of this initial and encouraging ruling, one might have thought that Tribe would have been wise to emphasize the city's essential similarity to a private corporation in seeking to have the Court set the case for briefing and argument. Such an approach would have echoed Brennan's and framed the case as one that involved rank viewpoint discrimination, with one set of corporations being allowed to make its case to the public and the other being denied the same right. Such an argument would have required Tribe to address the obvious distinguishing feature of a municipal corporation—that it was also a public government. But Tribe could have explained that Boston was doing the very same thing—spending its own money—that the private company had done in *Bellotti*. He might also have enlisted, by way of analogy, the market participant exception to the Dormant Commerce Clause, portraying the city as merely participating in the (private) marketplace of ideas.<sup>53</sup> Indeed, Tribe made a point of referring to cities as “municipal corporations” at the precise point in his argument in which he discussed *Bellotti*,<sup>54</sup> and his brief repeatedly suggested that, in this context, business corporations and cities were both simply “speakers” trying to inform the public on a matter of interest to them.<sup>55</sup>

Appealing to the essential similarity of cities and private businesses might also have helped Tribe in explaining why the Court's decision in *Hunter v. Pittsburgh*—and the long line of cases that reaffirmed its essential logic—did not present an insuperable obstacle to Boston's claimed constitutional right to disregard a state statutory restriction. After all, the *Hunter* line of authority indicated that although cities generally lack federal constitutional protection from their states, they might possess constitutionally protected private interests in city owned property.<sup>56</sup> But while Tribe did gesture towards this notion in his jurisdictional statement,<sup>57</sup> he ultimately chose to frame the dispute in a different way. Rather than downplay the city's governmental status, Tribe repeatedly highlighted it.

Tribe made it clear that the city's advocacy concerned a matter that concerned its “tax base, social structure, and fiscal survival.”<sup>58</sup> He further explained that, although *Bellotti* permitted a state to require its state-chartered businesses stick to “business,” the case also made clear that a state could not, consistent with the First Amendment, deem advocacy on matters of concern to business to be off limits. By parity of reasoning, Tribe argued, although a state could require a city to stick to city business, it could not define advocacy about the extent of local fiscal power as being beyond the city's authority. Tribe explained that such a circumscribed definition of the city's business would have no integrity since “little could be closer to the City's concern than the

52. *City of Boston I*, 439 U.S. at 1390.

53. See Tribe, *supra* n. 3, at 404–08, 436–41.

54. Br. in Opposition to Appellees' Mot. to Dismiss at 3, *City of Boston I*, 439 U.S. 1389.

55. Jurisdictional State. at 13, *City of Boston III*, 439 U.S. 1060.

56. See 207 U.S. at 179–80.

57. Jurisdictional State. at 20 n. 21, *City of Boston III*, 439 U.S. 1060.

58. *Id.* at 2.

structure of its property tax.”<sup>59</sup> In other words, precisely because the city was doing the business of government, it was engaged in proper speech activity. And thus, precisely because the city was a government, vested with taxing powers, it should win under *Bellotti*.

In addressing *Hunter*, Tribe also stressed the city’s independent sovereignty rather than its private aspect. He explained that the state’s constitutional power to establish “specialized local subdivisions” was not at issue because Massachusetts had clearly chosen to invest its cities and towns, Boston included, with ample home rule powers of government.<sup>60</sup> Indeed, Tribe noted, the Supreme Judicial Court had ruled that the grant of home rule authority included within it the power to engage in advocacy on behalf of referendums of the kind at issue in *Anderson*.<sup>61</sup> Thus, the only constitutional issue concerned a state’s power to impose selective restrictions on the kind of advocacy in which an otherwise fully empowered city could engage. Tribe put the point as follows:

Just as the theoretical power of a state to make city officials appointive rather than elective implies no authority to allocate votes unequally in a city election, see *Sailors v. Board of Education*, 387 U.S. 105, 108–111 (1967); *Avery v. Midland County*, 390 U.S. 474, 484–486 (1968); *Hadley v. Junior College Dist.*, 397 U.S. 50, 58–59 (1970), so a state’s theoretical power to make its cities and towns mere administrative arms of the central government, with no voices of their own, implies no authority to subject municipal advocacy to discriminatory, content-based regulation.<sup>62</sup>

Finally, in explaining why the Constitution barred states from preventing self-governing cities from advocating for a referendum concerning their basic governmental powers, Tribe appealed to basic notions of self-government. The city was not just another speaker. As a full fledged government, it had “unique qualifications”<sup>63</sup> to inform the public on the issue on the ballot, which concerned matters “going to the heart of government finance and tax structure and community well-being.”<sup>64</sup> In short, because the city was a self-governing polity, vested with broad governmental powers, it was especially constitutionally problematic to preclude it from speaking out.<sup>65</sup> If anything, then, the city’s claim to speak was even stronger than the corporations’ had been in *Bellotti*.

Tribe’s argument placed great weight on the state court’s judgment that the grant of home rule authority authorized municipal advocacy. It also relied heavily on the notion that Boston had a legitimate interest in seeking expanded taxing powers. It should have been something of an embarrassment, therefore, that the Massachusetts Home Rule

59. *Id.* at 28 n. 24.

60. *Id.* at 2.

61. *Id.*

62. Br. in Opposition to Appellees’ Mot. to Dismiss at n. 3, *City of Boston I*, 439 U.S. 1389.

63. Jurisdictional State. at 17, *City of Boston III*, 439 U.S. 1060.

64. *Id.*

65. Tribe acknowledged that the state might have a compelling interest in avoiding distortion of the democratic process or in protecting against unfairness to individual taxpayers within the city who did not support the referendum. But, Tribe explained, there was no evidence in the record that indicated that the city, subordinate to the state as it was, would monopolize democratic debate and, since the state had conceded that the city could advocate to the legislature, how could dissenters be more harmed by the city making its views known to the people as a whole? *Id.* at 27–29.

Amendment's text clearly excluded both taxation and elections from its scope.<sup>66</sup> Nonetheless, according to the state court's own ruling, a fully empowered democratic city, facing a true social and fiscal crisis, was trying to respond on behalf of its own citizens by doing that most democratic of things—informing the electorate about a matter of surpassing importance that they had been asked to decide at the ballot box. Hence, Tribe's question: If the federal Constitution was truly designed to promote the practice of self-government, could it really support a state's attempt to prevent such a city from doing just that?

*B. White v. Massachusetts Council of Construction Employers, Inc.*

Professor Tribe followed a strikingly similar approach in the second case in which he represented the City of Boston. The city's creative and aggressive new mayor, Kevin White, had issued an executive order in 1979 to stem the outflow of people and businesses and to help rebuild an urban middle class.<sup>67</sup> The order provided that "all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half *bona fide* residents of Boston."<sup>68</sup> The mayor's new policy was quickly challenged in state court for discriminating against out-of-state employees and thus violating the Dormant Commerce Clause. The Supreme Judicial Court of Massachusetts agreed,<sup>69</sup> and Professor Tribe petitioned the Supreme Court of the United States to reverse its judgment.

It is now fairly clear that state or local action that facially discriminates against out-of-state residents violates the Dormant Commerce Clause.<sup>70</sup> In the absence of such facial discrimination, a state or local action is unlawful only if it imposes an unreasonable burden on the free movement of commerce across state lines or if it manifests a clear protectionist purpose.<sup>71</sup> Thus, Dormant Commerce Clause challenges to nondiscriminatory measures rarely succeed, while those targeting facial discrimination often do. There are, however, two important categorical exceptions. Under the so-called market participant exception, cities or states that are engaged in market activity are exempt from review altogether.<sup>72</sup> In addition, because the Dormant Commerce Clause protects Congress's commerce powers, Congress may, by statute, authorize otherwise invalid state and local actions.<sup>73</sup>

In light of this doctrine, if the discrimination seems clear, then a city lawyer has powerful incentives to argue that the city is acting as a market participant or in accord with a statutory delegation from the national government. But while Professor Tribe did not disclaim these arguments in *White*, he also did not make them the centerpiece of his

66. Mass. Const. amend. art. 2, § 7.

67. *White*, 460 U.S. at 205.

68. *Id.* at 205–06 (emphasis added).

69. *Mass. Council of Const. Employers, Inc. v. Mayor of Boston*, 425 N.E.2d 346, 355 (Mass. 1981).

70. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 410 (2d ed., Aspen 2002).

71. *Id.* at 417.

72. *Id.* at 431.

73. *Id.* at 429.

case. Instead, he emphasized the city's self-governing status and the importance of its public regulatory function.

Tribe began by describing pressing social problems that the city confronted—unusually high inner city unemployment, an unskilled residential population, declining popular confidence that local government could solve problems, racial tensions, and a declining tax base.<sup>74</sup> In this way, Tribe sought to highlight the legitimacy of the city's interest in responding to real problems rather than whether its actions mimicked market behavior. Indeed, Tribe seemed to be trying to win the case on behalf of the city in a way that would not confine its options to those tied to the exercise of its contracting power: "Whether the Commerce Clause creates any such obstacle to municipal *options* for coping with inner-city joblessness, urban decay, and racial strife is the central issue posed by this case."<sup>75</sup> He further downplayed the import of the regulating/contracting distinction by recounting the "the centrifugal movement of capital and affluence to suburbia" and the "persistent joblessness" of "those who are left behind."<sup>76</sup> He argued that:

[While] America's cities have few viable options for breaking this awful cycle[,] [a]mong the most promising is that of directly rebuilding the city itself, making it a more attractive environment for those who have some choice about where to live and a more livable home for those who have no choice, through public works programs designed not simply to reconstruct the city physically but to expand the pool of human opportunities—for work and job training—available to its residents, and to maximize the fiscal return to the city and its people from the tax dollars collected from them by all levels of government.<sup>77</sup>

In other words, Tribe highlighted the city's role as planner, policymaker and taxing authority rather than as contractor, developer, or market participant.

The breadth of the city's executive order may have led Tribe to choose this frame. The order seemed to apply even to projects in which the city would do little more than provide the approval that would enable private developers to secure federal funds. In such cases, the city would not be acting as a conventional private market actor. Tribe conceded that the Court did not need to address the constitutionality of these applications, but he clearly invited it to do so. Insofar as the city's powers to impose a residency restriction were limited to city-funded construction projects, his brief suggested, they were likely to be ineffectual.<sup>78</sup> Because the city was in desperate fiscal shape, it had limited discretionary funds to commit to an ambitious rebuilding effort. The city could only accomplish the executive order's goals, in other words, if Boston could exercise power over development projects that relied primarily—or even entirely—on funding from on-city sources. Thus, Tribe's argument clearly pointed the Court away from issuing a narrow, market-participant holding and to one that would affirm the power of Boston—and other cities like it—to shape the kind of substantial

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74. Br. of Petrs. at 3–4, *White*, 460 U.S. 204.

75. *Id.* at 10 (emphasis added).

76. *Id.*

77. *Id.*

78. *Id.* at 27.

urban redevelopment effort that was necessary.<sup>79</sup>

Tribe acknowledged that the Commerce Clause gave states and cities the freedom “to enter the marketplace as buyers or sellers of goods,”<sup>80</sup> and that it permitted them to “reserve city jobs for city residents.”<sup>81</sup> But what the city really needed, Tribe suggested, was the power to promote public works in a much more flexible manner, even if that might involve the city in the exercise of “non-proprietary functions,”<sup>82</sup> such as administering a non-local public grant program. He suggested a kind of “but for” test: If the city’s own actions helped to create the private construction market, then the city should be permitted to shape it in ways that might include a local residency preference.<sup>83</sup>

In this respect, Tribe’s approach was similar to his approach in *Anderson*. Once again, Tribe urged the Court to look past familiar legal conceptions of city power to confront the larger question—should the federal Constitution stand as an obstacle to a central city, faced with the most pressing of social problems, striking out on its own to address them? In answering that question, moreover, he once again argued that the Constitution should be construed to support rather than undermine the choices of free, self-governing democratic cities: “Each city’s freedom to structure its tax-supported public works projects to achieve at once all of these tightly linked goals . . . is thus vital to the future of urban life in America, both in itself and as an instance of the sorts of policy options that a city’s leaders must be free to choose.”<sup>84</sup>

The very breadth of this argument raised the concern that Boston’s actions would unfairly burden other municipalities. Tribe tried to blunt that objection by casting the case as pitting a desperate central city against affluent surrounding suburbs. Far from imposing any significant extra-local harms, Boston was merely trying to protect itself from the adverse consequences of suburbanization. But was that right? The respondents emphasized that Boston was actually much better off than a number of other industrial cities in the state, such as Fall River and New Bedford. Construction workers in those cities might be denied job opportunities by Boston’s action.<sup>85</sup> Similarly, the respondents raised the specter of suburbs taking advantage of a pro-Boston ruling, adopting local residency preferences of their own that might prevent urban workers from obtaining construction jobs in those parts of the metropolitan area that were thriving.<sup>86</sup>

But Tribe’s brief had changed the terms of the debate. The parties were not arguing over whether Boston was acting as an ordinary market participant or exercising powers expressly delegated to it under a federal grant program. They were engaging the more fundamental issue that Tribe claimed was at stake—whether the federal Constitution should stand as an obstacle to a central city’s promising effort to address a fiscal and social crisis of immense scale? Justice Rehnquist acknowledged as much, albeit cryptically, in his majority opinion upholding the city’s executive order.

79. Br. of Petrs. at 20 n. 54, *White*, 460 U.S. 204.

80. *Id.* at 11.

81. *Id.*

82. *Id.* at 12 (quotation marks omitted).

83. Reply Br. of Petrs. at 4–5, *White*, 460 U.S. 204.

84. Br. of Petrs. at 11, *White*, 460 U.S. 204.

85. Br. of Respts. at 32, *White*, 460 U.S. 204.

86. *Id.* at 27.



Rehnquist explained that the parties had argued points that the Court did not need to address, given that the case concerned a facial challenge.<sup>87</sup> But in resting the case on the traditional categorical exceptions to Dormant Commerce Clause review,<sup>88</sup> Rehnquist did not foreclose affirmation of the bolder defense of city power Tribe proffered.

### C. Fisher v. City of Berkeley

The last case in the urban trilogy is in some ways the most interesting, even though it may seem the least significant. Unlike *Anderson*, in which Tribe deployed the federal Constitution as a sword to free a city from a *state* statutory restriction, or *White*, in which he defended a city against an attempt to use the federal Constitution as a bar against action state law permitted, *Fisher* concerned a claim that the city's action violated a federal statute. For that reason, the critical legal issue involved a question of federal statutory rather than constitutional interpretation. But, as in *Anderson* and in *White*, the case ultimately turned on a proper classification of the city's legal status, and it is this aspect of Tribe's approach that is of interest.

The case concerned a legal challenge to a rent control measure the City of Berkeley, California adopted through its local initiative process in 1980. The ensuing state court litigation considered whether the measure violated federal antitrust law,<sup>89</sup> and particularly section 1 of the Sherman Act, which makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."<sup>90</sup> The California Supreme Court rejected this contention,<sup>91</sup> but the Supreme Court of the United States granted certiorari to review it.<sup>92</sup>

The notion that federal antitrust law might preempt local regulation may seem odd. The federal law is principally aimed at restricting private anticompetitive conduct. But the Supreme Court's 1982 ruling in *Community Communications Co. v. City of Boulder* reaffirmed longstanding precedents that declined to immunize municipal action—including municipal regulation—from antitrust scrutiny.<sup>93</sup> To be sure, the Supreme Court had held in *Parker v. Brown*<sup>94</sup> that *states* enjoy broad protection from antitrust scrutiny,<sup>95</sup> but the so-called *Parker* state-action exemption had not been extended to cities. In fact, on several occasions, the Court expressed concern about doing so "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws,"<sup>96</sup> and the fact that "[o]urs is a 'dual system of government,' which has no place

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87. *White*, 460 U.S. at 208–09.

88. *Id.* at 209–10.

89. *Fisher II*, 475 U.S. 260.

90. 15 U.S.C. § 1 (2006).

91. *Fisher v. City of Berkeley*, 693 P.2d 261, 269 (Cal. 1984).

92. See *Fisher v. City of Berkeley (Fischer I)*, 471 U.S. 1124, 1124 (1985).

93. 455 U.S. 40, 56 (1982).

94. 317 U.S. 341 (1943).

95. *Id.* at 351.

96. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412–13 (1978).

for sovereign cities.”<sup>97</sup> As a result, cities had to show that they were implementing policy “pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service” in order to qualify for the *Parker* exemption.<sup>98</sup>

Against this background, the city’s rent control ordinance seemed vulnerable, unless the state action exemption could be shown to apply. After all, the Sherman Act probably rendered price fixing a *per se* violation,<sup>99</sup> and the city’s ordinance main effect was to limit price competition. How, then, could the city’s ordinance not at least be preempted? In addressing that question, Tribe did not face a difficult choice in determining whether to classify the city as public or private. Portraying the city in quasi-private or corporatist terms would clearly increase the likelihood of invalidation. There was no market participant exception under the Sherman Act. To the contrary, a city was at its most vulnerable when it was acting like a private business.

Tribe faced a more difficult choice in determining whether the city, assuming it was a government, should be portrayed as an independent democratic polity or as a mere subdivision of the state. The appeal of the state creature approach was obvious. The state-action exemption applies only if a city acts at the behest of the state, and the record provided considerable support for just such a showing. The state had expressly approved rent control in the city in 1974, and a more recent provision of state law required the state’s cities and towns to take steps to provide affordable housing.<sup>100</sup>

Nevertheless, Tribe chose a more controversial path, relegating the state ratification argument to a minor role. He chose to launch a frontal assault on the notion that federal antitrust law preempted local regulations that were rationally related to the promotion of the public welfare. To be sure, Tribe may have had a purely outcome-based reason for doing so. He might have been worried that the state’s earlier ratification would not cover the city’s 1980 initiative measure, or he might have thought that the bolder claim would lead the Court to fall back on the state-action exemption approach. But it is also possible that Tribe (and the city he represented) wanted to use the case to undo some of the *Community Communications* line of authority’s damage, thereby freeing cities from the shadow of federal antitrust liability and reaffirming their important role in the overall constitutional structure.

That the city had not engaged in a conspiracy to fix prices seemed clear enough. As Tribe explained, this restriction had been imposed democratically. To treat a city’s action as if it were no different from private collusion “would be to hold the social contract itself to be less a metaphor for our collective obedience to democratic majorities than a literal conspiracy in restraint of trade.”<sup>101</sup> But there was a more subtle claim that Tribe also had to confront—namely, that the Sherman Act impliedly preempted local action that, though not itself the kind of conspiracy that could result in the imposition of damages liability, was sufficiently anti-competitive as to be an obstacle to the pro-

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97. *Community Commun.*, 455 U.S. at 53 (citation omitted) (emphasis omitted).

98. *Fisher II*, 475 U.S. at 279 (Brennan, J., dissenting).

99. *See id.* at 265.

100. *Id.* at 271–72.

101. Br. for Appellees at 7, *Fisher II*, 475 U.S. 260.

competitive purposes of federal antitrust law.

To meet this argument, Tribe emphasized the lack of precedent actually holding local regulatory measures to be preempted by federal antitrust law.<sup>102</sup> But he also asked the Court to ignore the seeds of support for that conclusion that could be found in the case law, even relying, in doing so, on Justice Rehnquist's *dissent* in *Community Communications*.<sup>103</sup> There, Rehnquist had maintained that "[i]f municipalities are permitted only to enact ordinances that are consistent with the pro-competitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed."<sup>104</sup> Tribe was urging the Court to adopt that dissenting position as its own.

To be sure, Tribe did not argue that cities should receive the same blanket exemption that states enjoyed under *Parker*. In that respect, he was not asking the Court to overrule *Community Communications*. He argued instead that, even if cities could be sued under the Sherman Act, they should be permitted to assert a "public welfare" defense.<sup>105</sup> To bolster that argument, as in *Anderson* and in *White*, Tribe highlighted the social and economic problem that the city was attempting to address: "'the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents.'"<sup>106</sup> He did not deny that a public welfare defense would permit lots of anticompetitive local regulation. But he argued that if the Court refused to recognize it, it would have "[to be] prepared to accept 'the grave responsibility' of suppressing 'experimentation in things social and economic.'"<sup>107</sup>

As Tribe explained, "the ability of a populous and sprawling state such as California" would be immeasurably impaired if cities had to obtain express state approval before they could adopt any regulation that might be anticompetitive.<sup>108</sup> That was because "[b]usiness corporations and municipal corporations differ fundamentally in their goals."<sup>109</sup> Rather than regulating business to "achieve efficiencies in their 'business' . . . they do so in order to protect their citizens or to redistribute burdens and benefits among them in accord with the democratic process."<sup>110</sup> Thus, what was at stake in the case was not whether the pro-competitive goals of the Sherman Act would be promoted, but rather whether cities, as critical institutions of self-government, would be permitted to regulate on behalf of the public welfare.

The Court ruled for the City of Berkeley, holding that the city's action did not violate the Sherman Act because the element of concerted action was missing.<sup>111</sup> But Justice Brennan's dissent read the opinion as "holding that a municipality's authority to protect the public welfare should not be constrained by the Sherman Act."<sup>112</sup> Justice

102. *Id.* at 8.

103. *Id.* at 12.

104. *Community Commun.*, 455 U.S. at 67 (Rehnquist, J., dissenting).

105. *See* Br. for Appellees at 15, *Fisher II*, 475 U.S. 260.

106. *Id.* at 1–2.

107. *Id.* at 27 (quoting *New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

108. Br. for Appellees at 27, *Fisher II*, 475 U.S. 260.

109. *Id.* at 28.

110. *Id.*

111. *Fischer II*, 475 U.S. at 270.

112. *Id.* at 278 (Brennan, J., dissenting).

Brennan thought that conclusion unsupported by precedent, but he at least grasped Tribe's fundamental argument. The issue presented in the case was not the narrowly legalistic one of whether the city had actually been involved in a "conspiracy." It was the more conceptual one of whether cities should be permitted to regulate the market for reasons unrelated to the facilitation of private competition. The resolution of that issue turned less on technical legal interpretations than on one's view of democracy, self-government, and the likely capacity of cities to promote the public welfare. Tribe's brief had been an extended appeal to the Court to see the dispute from that perspective. If Brennan's dissent was evidence, it appeared that he had largely succeeded.

## VI. CONCLUSION

As a constitutional theorist, Professor Tribe has been famously suspicious of process-based theories of judicial review.<sup>113</sup> But it would be a mistake to confuse this attraction to a more substantive approach to constitutionalism with a disregard for its connection to the practice of self-government. Recently, Tribe has argued that the Bill of Rights aims less to secure individual autonomy, in the sense of negative liberty, than to enable "the self-governing experience of making, expressing, and renewing one's commitments, all the way from one's choices with respect to intimate relationships to one's choices as a participating member of a self-governing polity."<sup>114</sup> In elaborating on this notion in a recent article on the right to privacy and the Court's holding in *Lawrence v. Texas*,<sup>115</sup> Tribe looked back on three decades of his own scholarship and discerned in it a consistent claim that actually confounds the traditional substance/process dichotomy

that the institutional design of a society organized with our constitutional aspirations must be flexible and permeable enough to accommodate new ways of experiencing connection and growth both within personal relationships and within associations whose size may preclude calling them "personal" but whose purposes remain grounded in the formation and transmission of norms and ways of being, as opposed to the mere maximization of utility as measured by a fixed set of preexisting ends.<sup>116</sup>

Tribe clearly had the constitutional law of intimate association in view in this passage, but, I want to suggest, that same constitutional vision animated his work as an advocate for city power in *Anderson*, *White*, and *Fisher*. In these three cases, Tribe used his creative capacities and unparalleled gifts as a doctrinal analyst to call on the Court to conceive of the urban communities of the 1980s—with all of their problems, their poverty, and their desperation—as critical institutions through which individuals could, collectively, practice self-government as he defined that concept in his article on *Lawrence*. Thus, in consistently asking the Court to construe the Constitution—whether directly or in the course of interpreting federal statutes—to give cities the flexibility to assert their governmental powers, Tribe seems to have been doing more than finding a way to win the particular case at hand, no matter the rationale. How else to understand

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113. See e.g. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Interpretation*, 89 Yale L.J. 1063 (1980).

114. Tribe, *supra* n. 9, at 1941.

115. 539 U.S. 558 (2003).

116. Tribe, *supra* n. 9, at 1942.

his repeated request that the Court give cities—and the residents within them—the power to decide pressing matters on their own and without having to disclaim their public regulatory powers in the process?

Tribe's argument in these cases reminds us, then, how much is at stake in disputes over the proper scope of city power. The issue is not only whether the particular urban problem under review will be solved, nor even whether the city will have the authority to solve it. It is whether the city will be viewed, in the eyes of the law, as a democratic polity in its own right, entrusted to exercise public power so as to serve the needs of its own residents and to identify solutions to the problems that confront society more broadly. Cities, in seeking to defend their powers, should not be concerned solely with defending the particular exercise of power under challenge. They should have a broader horizon—perhaps even a constitutional one—in which they understand the immediate dispute to implicate the basic notions of democratic self-government that constitute our structure of government.

Thus, as successful cities contemplate the pursuit of creative responses to new urban realities, they should be willing to push the bounds of authority that the law of city power now affords them and to defend their assertions of power in appropriately fundamental terms. Rather than taking the safe course, or attempting only the incremental advance, Tribe's work suggests, they should challenge others to conceive of them as critical governmental institutions in their own right. In this respect, the aggressive assertion of urban power by successful cities in recent years should not be viewed as an unjustifiable breach of clear limitations on their authority or as an inappropriate power grab. It should be seen as an attempt to redefine and challenge conventional notions of what a city is and what its functions are. As Tribe's work shows, the law of city power is not fixed, nor capable of being fixed. It is open in the way that constitutional law always is, and thus it is subject to being creatively deployed on behalf of new understandings of what democratic self-government demands at a given moment. But that process of interpretation and reinterpretation requires city officials to have at least enough self-understanding to be aware of the opportunities for redefinition that the current legal structure makes available. Tribe's briefs in these three cases, then, represent an implicit call for cities to see in the current legal materials a chance to lay claim to a particular idea of their place within the broader constitutional structure, and one that would depend on legal decision makers being open to, rather than suspicious of, assertions by urban governments of new kinds of public regulatory power aimed at addressing problems their communities face.

In this regard, Tribe's approach also reminds us that courts, no less than the other institutions that are responsible for making the law of city power, must be cognizant of the role that they can play in establishing a legal culture that will make cities confident enough to practice self-government. Elsewhere, Tribe has explained that "courts do not have the luxury of deciding who did what to whom, measuring that conduct against pre-existing norms, awarding appropriate relief, and then proceeding as though the relief granted or withheld were all that ultimately mattered."<sup>117</sup> They must realize that "[t]he

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117. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern*

results courts announce—the ways they view the legal terrain and what they say about it—will in turn have continuing effects that reshape the nature of what the courts initially undertook to review, even beyond anything they directly order anyone to do or refrain from doing.”<sup>118</sup>

In making the law of city power, courts and other legal actors must recognize that they are not simply determining whether a particular local action will be upheld or struck down. They are “changing the legal and social landscape so that, after such cases are decided, people will be guided by assumptions and premises and patterns that differ from those that shaped their behavior before those cases were decided.”<sup>119</sup> Tribe’s litigation strategy in *Anderson*, *White*, and *Fisher* is best viewed, therefore, as more than a clever means of eking out narrow victories in discrete cases. It is an articulation of a vision of cities’ place within the broader governmental system, and thus an invitation to the Supreme Court to embrace that vision so that cities might understand themselves to be both entitled, and obliged, to promote self-government.

Finally, Tribe’s advocacy in these cases reminds us of the importance of a point that advocates of decentralization too often overlook. In calling upon others to work on behalf of the democratic city of the future, Dahl was quick to note that local “autonomy” was a phantom, and that the urban community he had in mind would inevitably and appropriately be subject to oversight from on high.<sup>120</sup> Similarly, Tribe did not contend in *Anderson* that cities enjoy a general First Amendment right to speak out on matters of public concern. He argued only that they could not be selectively restricted from doing so without the state identifying a legitimate basis for concluding that the local practice of self-government would undermine the democratic process or the rights of others. Nor did Tribe contend in *White* that cities should be free to impose whatever burdens on commerce they wished. He argued only that the city should not be thought to be limited solely to the exercise of those powers characteristically wielded by private business. And finally, and most clearly, he did not argue in *Fisher* that cities should be exempt from antitrust review altogether. He claimed only that they should be able to assert a public welfare defense to preemption, as befitted their status as democratic governments, focused on the achievement of ends distinct from those sought by mere market actors.

Indeed, Tribe made clear in *Fisher* that cities could violate the Sherman Act if it could be shown that they had legislated for purely private purposes.<sup>121</sup> In doing so, Tribe was not merely making a concession to those who were suspicious of urban power. He was implicitly defining what the practice of self-government—as he understood it—required. To defend all city action from antitrust scrutiny would be to imply that one could not distinguish city decision making undertaken for public ends from city decision making that was not.<sup>122</sup> Yet it was Tribe’s consistent contention that one could make that very distinction and that the federal constitutional structure contemplated a large role

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*Physics*, 103 Harv. L. Rev. 1, 20 (1989).

118. *Id.*

119. *Id.* at 23.

120. See generally Dahl, *supra* n. 11.

121. Br. for Appellees at 21 n. 55 and accompanying text, *Fisher II*, 475 U.S. 260.

122. See *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 371 (1991).

for the exercise of city power precisely because it assumed that it could be maintained.

That is not to say that Tribe's advocacy amounts to a full-blown theory of the relationship between decentralization and constitutional law. Was he saying that local governments should receive more deference than higher levels of governments? Was he suggesting that local governments should only be constrained by limitations that were clear? One cannot tell. Nor can one be certain that Tribe's defense of urban policymaking discretion in these cases was not, in the end, rooted in an affinity for the substantive way in which that discretion was being exercised. Would he have defended a central city's voucher plan from legal attack with the same vigor?<sup>123</sup> How about a city's defense of the limited voting rights conferred upon tenants in a urban business improvement district?<sup>124</sup> Again, the answer is not clear. Finally, one can not even be certain whether his vigorous defense of the actions taken by truly urban city governments—comprised of a population marked by socioeconomic diversity and overseeing territory defined by a range of land uses rather than solely residential ones—was intended to apply to the action of municipal governments more generally. In his treatise, for example, Tribe cast some doubt on the extent to which a stereotypical bedroom suburb could perform anything like the function of facilitating the practice of self-government he described in his Lawrence article. Of course, if Tribe meant to be distinguishing between the kinds of legal powers that "real" cities should be permitted to exercise from those of suburbs, then his argument raises a host of additional questions, and, again, the papers that he filed in *Anderson*, *White*, and *Fisher* do not attempt to answer them.

But the fact that Tribe's approach in these cases raises at least as many questions as it resolves does not mean that it fails to advance our understanding of the relationship between law—and constitutional law in particular—and city power. Dahl did not offer a full blown theory of decentralization, after all, in his 1967 speech identifying the possibilities that the democratic city of the future might hold for reinvigorating the practice of self-government. Instead, Dahl acknowledged that there were many problems with his proposal. But, he concluded, "even if no one can say whether [the democratic city of the future] will ever come about, or where," it was still important to remind "[those] stirred by the prospect of shaping politics now toward the good life in the 21st Century" that the opportunity to do so might lie in the democratic cities of the future.<sup>125</sup> It is in that same spirit that Tribe's defense of city power should be understood.

Tribe's advocacy offers us a language within which the debate over the law of city power can proceed that credits cities as independent democratic communities, vested with general public powers, and evaluates the bounds of their authority on the basis of that conception of their legal status. In doing so, then, Tribe, no less than Dahl, offers for our consideration a set of institutions that we could rely upon, if we chose, to facilitate "the self-governing experience of making, expressing, and renewing one's commitments,"<sup>126</sup> not only for ourselves but with each other.

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123. Cf. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

124. Cf. *Kessler v. Grand C. Dist. Mgt. Assn., Inc.*, 158 F.3d 92 (2d Cir. 1998).

125. Dahl, *supra* n. 11, at 970.

126. Tribe, *supra* n. 9, at 1941.